

## CONTRABAND OF WAR.

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The word contraband (Italian, *contrabbando*; Spanish, *contrabando*) signifies something prohibited—a trade carried on, or an article imported or dealt in, in violation of some inhibition. Thus, smuggled goods are often spoken of as contraband.

The term contraband of war denotes commodities which it is unlawful to carry to the country, or to the military or naval forces, of a belligerent. By a "belligerent" is meant one of the parties to a war. Often the word "enemy" is used instead of "belligerent." Writers constantly speak of an "enemy" or "enemy's" country, an "enemy" ship, or "enemy" goods, meaning thereby merely that the country, or the ship, or the merchandise, is that of a party to a war, that is to say, of a belligerent government or of one of its citizens. Sometimes the word "*hostile*" is used instead of "enemy."

When war breaks out between two countries, the carrying on of trade by the citizens of the one country with those of the other becomes unlawful; but the same general interruption does not extend to the commercial intercourse between the parties to the war and third parties, called neutrals. The intercourse between the belligerents and neutrals continues. This continuance is regarded not as a favor granted to the belligerents but as a right belonging to neutrals. As between the belligerents, neither is required to grant to the other any privilege in respect of trade. On the contrary, they endeavor to subdue each other by attacks upon persons and upon property. This is their acknowledged right. But the rest of the world, composed of neutral powers, having no part in the quarrel and perhaps little concern in the issue, also has its rights. Its interests and convenience are not to be wholly subordinated and sacrificed to the exigencies of the one or the other of the belligerents,

each of whom, while desirous to preserve its own trade, would of course be glad to cut off altogether that of its enemy; and it is therefore acknowledged to be the right of neutrals to continue their commerce with the belligerents, subject only to the restrictions imposed by the law of contraband and of blockade.

In proceeding to the discussion of the particular subject of contraband, it is proper to advert to the confusion which seems so widely to prevail as to the legal position of the prohibited trade. The statement is frequently made that the trade in contraband of war is lawful, even though this broad affirmation be immediately followed by the admission that the trade is carried on subject to the risk of capture and confiscation of the goods, and of the detention, loss of freight and perhaps even the confiscation of the ship. This admission should alone suffice to put us on our guard. Merchandise is not confiscated, voyages are not broken up, ships are not condemned, for acts that are innocent; these severe and destructive inflictions are penalties imposed for acts that are unlawful. The confusion so often exhibited on this subject is due to the neglect of certain simple but fundamental truths, namely, that, in the international sphere, and particularly in matters of neutrality, the criterion of lawfulness is primarily furnished by international law and not by municipal law, lawfulness according to the latter by no means implying lawfulness according to the former; that, between the acts which neutral governments and their citizens are forbidden to commit and the acts which neutral governments are obliged to prevent, there is a wide distinction; that, by international law, acts that are unneutral in the sense of being unlawful are, from the point of view of their prevention and punishment, divided into two classes, (1) those which neutral governments are bound to prevent and punish, and (2) those which neutral governments are not bound to prevent and punish; that municipal law is supposed to prohibit, not all the unneutral acts which international law forbids, but only that part of them which neutral governments are bound to repress, the prevention and punishment of the rest being left to the belligerents as the parties primarily interested. Obviously, the determination of the question whether an act is lawful or unlawful depends not upon

the circumstance that the right or duty to punish it is committed to one agency or another, but upon the fact that it is or is not punishable. The proof that it is unlawful is found in the fact that its commission is penalized. All acts for the commission of which international law prescribes a penalty are in the sense of that law unlawful. That there are various acts of this kind, such as the supplying of contraband of war to a belligerent, which neutrals are not obliged to prohibit and punish by their municipal law, merely signifies that the interests of neutrals have not been regarded as negligible, and that there are limits to the burdens which they have been required to assume and to the exertions which they are required to make. Should a neutral government itself supply contraband of war to a belligerent it would clearly depart from its position of neutrality. The private citizen undertakes the business at his own risk, and against this risk his government can not assure him protection without making itself a party to his unneutral act.

These propositions are abundantly established by authority.

Maritime states, says Heffter, have adopted,

in a common and reciprocal interest, the rule that belligerents have the right to restrict the freedom of neutral commerce so far as concerns contraband of war, and to punish violations of the law in that regard. . . . This right has never been seriously denied to belligerents.<sup>1</sup>

Says Kent:

The principal restriction which the law of nations imposes on the trade of neutrals is the prohibition to furnish the belligerent parties with warlike stores and other articles which are directly auxiliary to warlike purposes.<sup>2</sup>

Says Woolsey:

If the neutral [government] should send powder or balls, cannon or rifles, this would be a direct encouragement of the war, and so a departure from the neutral position. . . . Now, the same wrong is committed when a private trader, without the privity of his government, furnishes the means of war to either of the warring parties. It may be made a question whether such conduct on the part of the private citizen ought not to be prevented by his government, even as enlistments for foreign armies on neutral soil are made penal. But it is difficult for a government to watch narrowly the operations of trade, and it is annoying for the innocent trader. Moreover,

<sup>1</sup> Heffter, "Droit Int.," Bergson's ed., by Geffcken, 1883, p. 384.

<sup>2</sup> Kent, "Int. Law," 2d ed., by Abdy, 330.

the neutral ought not to be subjected by the quarrels of others to additional care and expense. Hence by the practice of nations he is passive in regard to violations of the rules concerning contraband, blockade, and the like, and leaves the police of the sea and the punishing or reprisal power in the hands of those who are most interested, the limits being fixed for the punishment by common usage or law. . . . It is admitted that the act of carrying to the enemy articles directly useful in war is a wrong, for which the injured party may punish the neutral taken in the act.<sup>3</sup>

Says Manning:

The right of belligerents to prevent neutrals from carrying to an enemy articles that may serve him in the direct prosecution of his hostile purposes has been acknowledged by all authorities, and is obvious to plain reason. . . . The nonrecognition of this right . . . would place it in the power of neutrals to interfere directly in the issue of wars—those who, by definition, are not parties in the contest thus receiving a power to injure a belligerent, which even if direct enemies they would not possess.<sup>4</sup>

Says Creasy:

A belligerent has by international law a right to seize at sea, and to appropriate or destroy, articles, to whomsoever they may belong, which are calculated to aid the belligerent's enemy in the war, and which are being conveyed by sea to that enemy's territory.<sup>5</sup>

Says Holland:

The neutral power is under no obligation to prevent its subjects from engaging in the running of blockades, in shipping or carrying contraband, or in carrying troops or dispatches from one of the belligerents; but, on the other hand, neutral subjects so engaged can expect no protection from their own government against such customary penalties as may be imposed upon their conduct by the belligerent who is aggrieved by it.<sup>6</sup>

The fact that the supplying of contraband of war is considered as a participation in the hostilities is shown not only by the authority of writers, but also by numerous state papers.

Washington, in his famous neutrality proclamation of April 22, 1793, countersigned by Jefferson, as Secretary of State, announced that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against any of the said powers, or by carrying

<sup>3</sup> Woolsey, "Int. Law," §§ 178, 179.

<sup>4</sup> Manning's "Law of Nations," Amos's edition, 352.

<sup>5</sup> Creasy, "First Platform of Int. Law," 604.

<sup>6</sup> Holland, "Studies in Int. Law," 124-125. See, also, Moore, *Digest of Int. Law*, VII., 972-973.



to any of them those articles which are deemed contraband by the modern usage of nations, will not receive the protection of the United States against such punishment or forfeiture.<sup>7</sup>

Jefferson, in his subsequent note to the British minister, May 15, 1793, observes that in the case of contraband the law of nations is satisfied with the "external penalty" pronounced in the President's proclamation.<sup>8</sup>

President Grant, in the proclamation issued by him August 22, 1870, during the Franco-German war, declares, in the most precise terms:

While all persons may lawfully, and without restriction, by reason of the aforesaid state of war, manufacture and sell within the United States arms and munitions of war, and other articles ordinarily known as "contraband of war," yet they can not carry such articles upon the high seas for the use or service of either belligerent, . . . without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf. And I do hereby give notice that all citizens of the United States, and others who may claim the protection of this Government who may misconduct themselves in the premises, will do so at their peril, and that they can in no wise obtain any protection from the Government of the United States against the consequences of their misconduct.<sup>9</sup>

In the neutrality proclamations, issued during the war between the United States and Spain, the following provisions are found, in which the furnishing of arms and munitions of war to either party to the conflict is expressly treated as an act of unneutrality.

The Brazilian government, by a circular of April 29, 1898, declared to be "absolutely prohibited" the "exportation of material of war from the ports of Brazil to those of either of the belligerent powers, under the Brazilian flag or that of any other nation."<sup>10</sup>

The King of Denmark issued April 29, 1898, a proclamation prohibiting Danish subjects "to transport contraband of war for any of the belligerent powers."<sup>11</sup>

Great Britain's proclamation of April 23, 1898, warned British subjects against doing any act "in derogation of their duty as sub-

<sup>7</sup> Am. State Papers, For. Rel., I., 140.

<sup>8</sup> Moore, "Digest of Int. Law," VII., 955.

<sup>9</sup> Moore, "Digest of Int. Law," VII., 751.

<sup>10</sup> Proclamations and Decrees during the War with Spain, 13.

<sup>11</sup> Proclamations, etc., 22.

jects of a neutral power," or "in violation or contravention of the law of nations," among which was enumerated the carrying of "arms, ammunition, military stores or materials"; and declared that "all persons so offending, together with their ships and goods, will rightfully incur and be justly liable to hostile capture, and to the penalties denounced by the law of nations."<sup>12</sup>

The governor of Curaçao, acting under instructions of the minister of the colonies of the Netherlands, issued a decree prohibiting "the exportation of arms, ammunition, or other war materials to the belligerents."<sup>13</sup>

Portugal, while stating, in Article IV. of her neutrality decree of April 29, 1898, that "all articles of lawful commerce" belonging to subjects of the belligerent powers might be carried under the Portuguese flag, and that such articles belonging to Portuguese subjects might be carried under the flag of either belligerent, yet declared: "Articles that may be considered as contraband of war are expressly excluded from the provisions of this article."<sup>14</sup>

Were further proof needed of the unneutral and noxious character of contraband trade, it might be found in the doctrine of infection, under which innocent cargo is condemned when associated with contraband merchandise of the same proprietor, and the transportation penalized by loss of freight and expenses, and, under various circumstances, by confiscation of the ship.

Bearing in mind that the subject which we are considering is one of universal interest, directly affecting the world's trade and involving the imposition of heavy pecuniary penalties upon individuals, one ventures little in saying that among present-day questions of maritime law, touching intercourse between belligerents and neutrals, the most important is that of contraband. This may be affirmed in spite of the fact that, partly because of the lack of great maritime wars in recent times, its gravity may not at the moment be generally or popularly appreciated. The question of

<sup>12</sup> Id., 35.

<sup>13</sup> Id., 27.

<sup>14</sup> Id., 61. See, also, the proclamation of the taotai of Shanghai, *id.*, 20, and the instructions of the Haitian Government, *id.*, 39.

blockade, although it once assumed immense proportions, to a great extent lost its importance when the principle was established that blockades in order to be legally valid must be effective, that is to say, maintained by a force sufficient to prevent access to the blockaded port or at least to render such access dangerous. Since the definite and universal acceptance of this principle, by which neutral commerce was relieved of the hazards to which it was formerly exposed from measures generically designated by the evil name of "paper blockades," the conflict between belligerent right and neutral right has been carried on chiefly in the domain of contraband, to which it may be said that all the legal uncertainties that formerly attended the subject of blockade have been transferred, with many additions and aggravations.

In order to demonstrate the paramount importance of the question of contraband, it is unnecessary to do more than point out that, if the claim of capture on this ground be not properly limited, the two great safeguards of neutral rights established after generations of conflict become utterly worthless. I refer to the rule that free ships make free goods and the rule that blockades must be effectively maintained.

*First*, let us consider the rule that free ships make free goods. By what has been called the common law of the sea, the goods of an enemy were subject to capture and confiscation without regard to the character of the ship in which they were borne. The enforcement of this rule necessarily involved the capture and bringing in of neutral vessels whose cargoes were alleged to be composed even in small part of the goods of a belligerent. The breaking up of the voyages of neutral vessels in this manner, with all the resultant losses, involved so much hardship to carriers in no way concerned in the conflict that, as early as the seventeenth century, there sprang up an agitation for the exemption of neutral vessels from molestation for carrying goods which happened to belong to a citizen of a belligerent country. Such an exemption gradually came to be embodied in treaties; and when on February 28, 1780, the Empress Catherine of Russia issued her celebrated manifesto, which formed the basis of the Armed Neutrality, she announced this principle:

2. Goods belonging to the subjects of the said nations at war are, with the exception of contraband articles, free [from capture] on board neutral vessels.

This definite enunciation of the rule that free ships make free goods was incorporated in the Declaration of Paris of 1856 in the following term:

2. The neutral flag covers the enemy's goods, with the exception of contraband of war.

The United States, Spain and Mexico (Mexico acting under the direct influence of the United States) did not adhere to the Declaration of Paris, because it undertook to abolish privateering; but the United States and Spain expressly accepted the rule that free ships make free goods, and this was proclaimed by the United States in 1898 as a principle of international law and was so accepted by Spain in the war between the two countries in that year. Moreover, Spain has since adhered to the Declaration of Paris in its entirety. But, note the exception to the rule. Enemy's goods are exempt from capture under the neutral flag, "with the exception of contraband of war." In other words, the operation of this rule and the protection intended to be afforded by it are wholly dependent upon the definition of contraband. Make the list of contraband long enough, and the rule becomes a farce.

*Secondly*, take the present law of blockade. At one time fictitious blockades were the bane of neutral commerce. In the twelve years that followed the breach of the Peace of Amiens—the days of the so-called Napoleonic wars—millions upon millions of neutral property were unlawfully confiscated for the alleged violation of or attempt to violate blockades which existed only on paper.

The declaration of the Empress Catherine above referred to contained the following rule:

4. To determine what constitutes a blockaded port, this denomination is confined to those the entrance into which is manifestly rendered dangerous in consequence of the dispositions made by the attacking power with ships stationed sufficiently near.

The Declaration of Paris of 1856 provided:

4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The world accepted this principle with joyful unanimity. We may, however, pertinently inquire, What is it worth, if the definition of contraband be not properly limited? The answer is not difficult. If the definition of contraband be so extended as to embrace in some form, positively or conditionally, practically all articles of commerce, the question of blockade ceases to be important. The security intended to be afforded to the neutral, by requiring the belligerent to make his blockade effective, becomes a mockery; the belligerent is practically relieved of the burden of maintaining blockades, for, instead of keeping his ships at certain points and hampering his offensive use of them, he can roam the seas at will and seize all articles destined to any belligerent port under the claim of contraband.

Let us consider the significance of the question of contraband in yet another relation. It is creditable to our humanity that proposals having a benevolent sound usually evoke a prompt and generous response, but it sometimes happens that the substance upon examination turns out to be less benevolent than the sound. We have lately heard much of the proposed immunity of private property at sea from capture. The United States is said to have advocated such a measure at both Hague Conferences. What has happened is actually this: Some of our earlier statesmen, notably Franklin, did in reality advocate a very wide exemption not only of property but also of persons, on land as well as on the sea, from the operations of war; and their example was followed by some of their successors. In 1857 the government of the United States, being embarrassed by its refusal to accede to the Declaration of Paris on account of the clause abolishing privateering, offered to adhere on condition that the powers go farther and exempt private property at sea from capture; but this offer was expressly subject to the exceptions of contraband and blockade. In 1907 Mr. Choate, on behalf of the Delegation of the United States, submitted to the second Peace Conferences at The Hague the following resolution:

The private property of all citizens or subjects of the signatory powers, with the exception of contraband of war, shall be exempt from capture or seizure on the sea by the armed vessels or by the military forces of any of



the said signatory powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said powers.

What therefore the United States since 1850 has proposed is, not that private property at sea shall be exempt from capture, but that it shall be so exempt, subject to the exceptions of contraband and blockade. The proposal, as thus qualified, no doubt had a substantial character in 1857, since the government of the United States at that day still recalled the limitations upon contraband for which it had traditionally contended. The case was the same when, by the treaty of commerce between the United States and Italy of February 26, 1871, it was actually agreed (Article XII.) that, in the event of war between the two countries, the private property of their citizens and subjects should be exempt from capture on the high seas or elsewhere, subject to the exceptions of contraband and blockade; for the treaty then proceeded (Article XV.) precisely to limit the scope of contraband, confining it to arms and munitions of war, and declaring that those articles "and no others" should be comprehended under that denomination.<sup>15</sup> But at The Hague, in 1907, the importance of the exceptions was greatly enhanced by the separate presentation on the part of the United States of an extremely vague and sweeping proposition on contraband of war, in which provisions appear, no doubt for the first time in American diplomacy, in the category of absolute as well as in that of conditional contraband.<sup>16</sup> Taking into consideration the objects of war, opinions will necessarily differ as to the merits and value of a proposal to exempt enemy ships and enemy goods as such from capture, while leaving in force the law of blockade and of contraband, without any precise definition or limitation of the latter. Such a proposal holds out no advantage to neutrals, but offers to belligerents the favor of placing them on the same footing as neutrals commercially. And even the extent of this favor would depend upon the definition and scope of contraband. Is there not, indeed, a certain incongruity in exempting from capture such an obviously important

<sup>15</sup> Note A, *infra*, p. 42.

<sup>16</sup> Note B, *infra*, p. 43.

auxiliary to military and naval operations as the ships of an enemy, while subjecting to seizure and confiscation the agricultural products of a neutral?

The question of contraband may now be considered in its historical and experimental aspects. It is unnecessary for this purpose to enter minutely into the origin of the subject. It suffices to say that in the sixteenth and the early part of the seventeenth century, the law of contraband and of blockade both being unsettled, belligerents often assumed the right to capture all neutral ships and merchandise bound to an enemy's port, thus in effect denying the existence of any right of neutral trade as opposed to belligerent exigencies. The neutral, if he differed with the belligerent as to the necessity of the inhibition or the propriety of the capture, would resort to reprisals. The conflicts that resulted and the constant interruptions of trade, rendering it impossible to carry on international commerce without risk of ruinous losses, induced governments in the latter half of the seventeenth century to concert a decided change in practice.

Grotius, in his *De Jure Belli ac Pacis* (1625), perhaps recording the transition in thought, divided articles, with reference to the question of contraband, into three classes, (1) those that were of use only in war, (2) those that were of no use in war, but served only for pleasure, and (3) those that were useful both in war and in peace (*i. e.*, things of double use, *incipitis usus*), as money, provisions, ships and their appurtenances. The first he held to be prohibited; the second, to be free. As to the third, the circumstances of the war must, he said, be considered; and if the belligerent could not protect himself unless he intercepted it, necessity would give him the right to intercept it, "but under the obligation of restitution, except there be cause to the contrary." As an example of "cause to the contrary," he instanced the case of the supplying of a besieged town or a blockaded port, when a surrender or a peace was daily expected.<sup>17</sup>

By a treaty between France and the Hanse Towns, signed at Paris May 10, 1655, contraband was confined to munitions of war,

<sup>17</sup> Grotius, "De Jure Belli ac Pacis," Lib. III., c. I., v, 1-3.

and it was expressly declared that wheat and grains of all sorts, vegetables and other things serving to sustain life, might be carried to the enemy, provided that they were not transported to towns and places actually under attack and were taken voluntarily and not under compulsion of the enemy, in which case they might be seized and retained on paying their just value.

November 7, 1659, there was concluded between France and Spain the famous Treaty of the Pyrenees: Articles XII. and XIII. dealt with the subject of contraband, including therein only such things as were distinctly of warlike character, and excluding therefrom wheat, corn and other grains, pulse, oils, wines, salt, and generally all things useful to sustain life, unless destined to towns and places "besieged, blocked up, or surrounded."<sup>18</sup>

The Dutch agreed to these categories in 1662, and were soon followed by Great Britain, in treaties made with the United Provinces and Spain in 1667, and with France in 1677.

In 1713 came the Peace of Utrecht. By the treaties concluded between France and the other powers on that occasion, the subject of contraband was definitely regulated on the most advanced lines. For example, in the treaty of commerce with Great Britain signed April 11 (1713), while contraband was limited to certain enumerated articles of warlike character, the non-contraband list, which embraced wheat, barley and other grains, pulse, tobacco, spices, salt and smoked fish, cheese and butter, beer, oils, wines, sugars, salt, "and in general all provisions which serve for the nourishment of mankind and the sustenance of life," was extended to many other articles, all of which were declared to be free except when transported to places "besieged, blocked up round about, or invested."<sup>19</sup>

Similar stipulations were incorporated in the British-French commercial treaty signed at Versailles September 26, 1786.

In the manifesto of the Empress Catherine of Russia of 1780, which formed, as heretofore stated, the basis of the Armed Neutrality, it was declared that her Imperial Majesty adhered to Articles X. and XI. of her treaty of commerce with Great Britain, and ex-

<sup>18</sup> Note C, *infra*, p. 43.

<sup>19</sup> Note D, *infra*, p. 44.

tended their provisions to all the nations at war. This treaty was concluded June 20, 1766. With the "single exception" of certain enumerated articles, which were "accounted ammunition or military stores," it was agreed that the subjects of the one party might transport "all sorts of commodities" to places belonging to the enemy of the other that were not "actually blocked up, or besieged, as well by sea as by land."<sup>20</sup>

Such was the condition of things when the wars growing out of the French Revolution began. The enthusiastic devotion of the French on the one hand to the principles which they had espoused, and the frenzied resistance of monarchical governments on the other hand to what they regarded as an anarchical propagandism threatening thrones everywhere by force of example if not by force of arms, imparted to these struggles a peculiarly intense and lawless character. Three months after the war between France and Great Britain was declared, the National Convention, May 9, 1793, there being a scarcity of food in France, adopted a decree authorizing the seizure of vessels laden wholly or in part with provisions, which, if found to be neutral property, were to be paid for at the price which they would have fetched at the port of destination, together with an allowance for freight and for the vessel's detention. This was a claim not of contraband but of preemption. Nevertheless, the United States protested against it, and it was not uniformly enforced against American vessels. Great Britain on the other hand, wishing not only to supply her own wants but to increase the pressure on France, advanced a claim compounded of contraband and preemption. By an order in council of June 8, 1793, which was communicated to the Admiralty on the 28th of the same month, the commanders of British ships of war and privateers were authorized to seize all vessels laden wholly or in part with corn (*i. e.*, cereals generally, as wheat, barley, rye and oats, but more especially wheat), flour, or meal, bound to any port in France, or any port occupied by the armies of France, in order that such provisions might be purchased on behalf of the government, with an allowance to the vessel for freight, or in order that the master might be required to give

<sup>20</sup> Note E, *infra*, p. 44.

security to dispose of such cargo in a country in amity with Great Britain. The British government assumed to justify this order on the ground that by the law of nations, as laid down by the most modern writers, and particularly by Vattel, all provisions were to be considered as contraband, and as such liable to confiscation, where the depriving an enemy of them was one of the means intended to be employed for reducing him to reasonable terms of peace; and that the actual situation of France rendered this reasoning peculiarly applicable, not only because the scarcity there was caused by the unusual measure of arming almost the whole laboring class of the nation, but also because the trade was to be regarded, not as a mercantile speculation of individuals, but as an immediate operation of the very persons who had declared war and were carrying it on against Great Britain. On these considerations, said the British government, the powers at war would have been perfectly justifiable if they had considered all provisions as contraband and had directed them as such to be brought in for confiscation, but they had only sought to prevent the French from being supplied with corn, omitting all mention of other provisions, and even in respect of corn, instead of confiscating the cargoes, had secured to the proprietors, if neutral, a full indemnity for any loss they might sustain.

The United States on the other hand declared that the position that provisions were contraband in the case where the depriving an enemy of them was one of the means intended to be employed for reducing him to reasonable terms of peace, or in any case but that of a place actually blockaded, was entirely new; that reason and usage had established that, when two nations went to war, those who chose to live in peace retained their natural right to pursue their agriculture, manufactures, and other ordinary vocations, and to carry the produce of their industry, for exchange, to all nations, belligerent or neutral, except that they must not furnish implements of war to the belligerents or send anything to a blockaded place. Implements of war destined to a belligerent were treated as contraband, and were subject to seizure and confiscation. Corn, flour, and meal were not, said the United States, of the class of contraband, and consequently remained articles of free commerce. The



state of war between Great Britain and France furnished neither belligerent with the right to interrupt the agriculture of the United States, or the peaceable exchange of its produce with all nations. Such an act of interference tended directly to draw the United States from the state of peace in which they wished to remain. If the United States permitted corn to be sent to Great Britain and her friends, and refused it to France, such an act of partiality might lead to war with the latter power. If they withheld supplies of provisions from France, they should in like manner be bound to withhold them from her enemies also, and thus to close to themselves all the ports of Europe where corn was in demand, or else make themselves a party to the war. This was a dilemma into which no pretext for forcing the United States could be found. Great Britain might, indeed, feel the desire of starving an enemy nation; but she could have no right to do it at the cost of the United States, or to make the latter the instrument of it.<sup>21</sup>

Such was the position maintained by the United States; and when John Jay was sent on a special mission to England in 1794 to negotiate a settlement of differences, the first topic discussed in his instructions was that of the vexations inflicted on commerce under orders in council. By the treaty which he signed on November 19, 1794, a precise enumeration was made (Article XVIII.) of the things which were admitted to be contraband, and it was stipulated that when cases arose in which "provisions and other articles not generally contraband" might, according to the existing law of nations, be regarded as becoming such, they should not, even though seized on that ground, be confiscated, but should be paid for at their full value, together with a reasonable mercantile profit, freight and demurrage.<sup>22</sup> Nor was this all. A mixed commission was established under the treaty (Article VII.) to adjudicate complaints on account of seizures. The British authorities, where they made compensation for cargoes of provisions, adopted as a basis the invoice price plus a mercantile profit of ten per cent. The claimants contended that this was inadequate. The commission allowed the net

<sup>21</sup> For a full narrative of this incident and the text of the orders in council, see Moore's "History and Digest of International Arbitrations," I., 299-306.

<sup>22</sup> Note F, *infra*, p. 45.

value of the cargo at its port of destination at the time at which it probably would have arrived there, had it not been seized. The awards of the commission in the case of captured vessels laden with provisions and bound to France are estimated to have amounted to £720,000, or approximately \$3,500,000.<sup>23</sup>

The position successfully maintained by the United States in the case of Great Britain was altogether in accord with that which was reciprocally acted upon in its relations with other powers. The commercial treaty with France of 1778—the first treaty concluded by the United States—substantially incorporated the Utrecht clause on the subject of contraband,<sup>24</sup> as also did the later convention of 1800. A similar stipulation may be found in the treaty with Sweden of 1783, and in that with Spain of 1795. In the treaties of 1785 and 1799 the United States and Prussia went so far as to agree that even arms and munitions of war, when seized as contraband, should not be confiscated, but that the captor should pay for them if he converted them to his own use, or pay damages if he merely detained them.<sup>25</sup> In the treaty between the United States and Colombia of 1824 a clause on contraband was inserted which furnished the model followed by the United States with practical uniformity in its subsequent treaties.<sup>26</sup> It is substantially reproduced in the contraband articles of the treaty with Italy of 1871. It may also be found in identical or nearly identical terms in the treaties between the United States and the following powers: Central America, 1825; Brazil, 1828; Mexico, 1831; Chile, 1832; Peru-Bolivia, 1836; Venezuela, 1836 and 1860; Ecuador, 1839; New Granada, 1846; Salvador, 1850 and 1870; Peru, 1851 and 1870; Two Sicilies, 1855; Bolivia, 1858; Haiti, 1864; Dominican Republic, 1867.

During the war with Spain, in 1898, the subject of contraband was dealt with by the United States in General Orders No. 492, which specified certain articles as "absolutely contraband" and others as "conditionally contraband." The former included arms

<sup>23</sup> Moore, "History and Digest of International Arbitrations," I., 343-344.

<sup>24</sup> Note G, *infra*, p. 46.

<sup>25</sup> Note H, *infra*, pp. 47-48.

<sup>26</sup> Note I, *infra*, p. 48.

and munitions of war and machinery for their manufacture, saltpeter, military accoutrements and equipments, and horses. The "conditionally contraband" were:

Coal, when destined for a naval station, a port of call, or a ship or ships of the enemy; materials for the construction of railways or telegraphs, and money, when such materials or money are destined for the enemy's forces; provisions, when destined for an enemy's ship or ships, or for a place that is besieged.

In the early stages of the Boer war a question arose between the United States and Great Britain as to the seizure of various articles shipped at New York, some of them on regular monthly orders, by American merchants and manufacturers on the vessels *Beatrice*, *Maria*, and *Mashona*, which were seized by British cruisers while on the way to Delagoa Bay. These articles consisted chiefly of flour, canned meats, and other foodstuffs, but also embraced lumber, hardware, and various miscellaneous articles, as well as quantities of lubricating oil, which were consigned partly to the Netherlands South African Railway, in the Transvaal, and partly to the Lourenço Marques Railway, a Portuguese concern. It was at first supposed that the seizures were made on the ground of contraband, and with reference to this possibility the government of the United States, on January 2, 1900, declared that it could not recognize their validity "under any belligerent right of capture of provisions and other goods shipped by American citizens in ordinary course of trade to a neutral port." It soon transpired, however, that the *Beatrice* and *Mashona*, which were British ships, and the *Maria*, which, though a Dutch ship, was at first supposed to be British, were arrested for violating a municipal regulation forbidding British subjects to trade with the enemy, the alleged offense consisting in the transportation of goods destined to the enemy's territory. The seizure of the cargoes was declared to be only incidental to the seizure of the ships. As to certain articles, however (particularly the oil consigned to the Netherlands South African Railway in the Transvaal), an allegation of enemy's property was made; but no question of contraband was raised, and it was eventually agreed that the United States consul-general at Cape Town should arrange with Sir Alfred Milner,

the British high commissioner, for the release or purchase by the British government of any American-owned goods, which, if purchased, were to be paid for at the price they would have brought at the port of destination at the time they would have arrived there in case the voyage had not been interrupted. In the course of the correspondence, Lord Salisbury thus defined the position of the British government on the question of contraband:

Food stuffs, with a hostile destination, can be considered contraband of war only if they are supplies for the enemy's forces. It is not sufficient that they are capable of being so used; it must be shown that this was in fact their destination at the time of the seizure.

This statement by Lord Salisbury was in harmony with what is laid down in Holland's Manual of Naval Prize Law, issued by the British Admiralty in 1888. In this Manual conditional contraband embraces provisions and liquors fit for consumption of army or navy; money; telegraphic materials, such as wire, porous cups, platina, sulphuric acid, and zinc; materials for railway construction, as iron bars and sleepers; coals, hay, horses, rosin, tallow, and timber. But these articles, it is stated, "are contraband only in case it may be presumed that they are intended to be used for the purposes of war," and "this presumption arises when such hostile destination of the vessel is either the enemy's fleet at sea, or a hostile port used exclusively or mainly for naval or military equipment."

On the outbreak of the war with Japan, the Russian government, in March, 1904, published instructions to its naval commanders which forbade the conveyance of contraband "to Japan or to Japanese armed forces," and denounced as contraband "foodstuffs," including all kinds of grain, fish, fish products of various kinds, beans, bean oil, and oil cakes. The British government protesting expressed "great concern" that "rice and provisions" should be treated as unconditionally contraband, this being regarded "as inconsistent with the law and practice of nations." The British government, it was declared, did not contest "that, in particular circumstances, provisions may acquire a contraband character, as for instance, if they should be consigned direct to the army or fleet of a belligerent, or to a port where such fleet may be lying"; but it

could not admit "that if such provisions were consigned to the port of a belligerent (even though it should be a port of naval equipment) they should therefore be necessarily regarded as contraband of war." The true test appeared to be "whether there are circumstances relating to any particular cargo to show it that it is destined for military or naval use."

The United States was obliged to deal with the same question in the case of the steamer *Arabia*, whose cargo, composed of railway material and flour, destined to Japanese ports and consigned to various commercial houses there, was condemned by the Russian prize court at Vladivostok as contraband, on the strength of its destination. The United States protested against this judgment as involving a "disregard of the settled law of nations." The United States declared that it was "vital to the legitimate maritime commerce of neutral states" that there should be "no relaxation" of the distinctions with regard to contraband; that there was and could be "no middle ground"; that "the criterion of warlike usefulness and destination" had "been adopted by the common consent of civilized nations, after centuries of struggle in which each belligerent made indiscriminate warfare upon all commerce of all neutral states with the people of the other belligerent, and which led to reprisals as the mildest available remedy"; that, while articles such as arms and ammunition, self-evidently of war-like use, were contraband if destined to enemy territory, yet articles such as coal, cotton, and provisions, which, though ordinarily innocent, were capable of war-like use, were "not subject to capture and confiscation unless shown by evidence to be actually destined for the military or naval forces of a belligerent"; that "this substantive principle of the law of nations" could "not be overridden by a technical rule of the prize court that the owners of the captured cargo must prove that no part of it" might reach the enemy forces; and that, such proof being "of an impossible nature," its exaction would render neutral commerce impossible and result in the condemnation of the innocent with the guilty. In conclusion the ambassador of the United States at St. Petersburg was instructed to express "the deep regret and grave concern" with which his government had received the unqualified



communication of the decision of the prize court, and was directed to "make earnest protest against it" and to say that his government regretted "its complete inability to recognize the principle of that decision and still less to acquiesce in it as a policy."

In consequence of the British and American protests the Russian government appointed a commission to consider the question of contraband, and on October 22, 1904, announced that, while horses and beasts of burden would continue to be treated as contraband of war, yet various other articles, including rice and foodstuffs, would be considered as contraband if destined for a belligerent government, its administration, army, navy, fortresses, naval ports, or purveyors, but not if "addressed to private individuals."

Since the war between Russia and Japan, the subject of contraband has been dealt with in the Declaration of London, signed February 26, 1909, by representatives of Germany, the United States, Austria-Hungary, Spain, France, Great Britain, Italy, Japan, the Netherlands, and Russia, with the object of laying down rules of maritime law, embracing blockade, contraband, unneutral service, destruction of neutral prizes, and various other subjects, for the government of the International Prize Court which Germany proposed to the Second Peace Conference at The Hague, and for the constitution of which provision was made by the convention signed on October 18, 1907. As the House of Lords has lately rejected a bill, which had passed the Commons, to carry this convention into effect, the fate of the Declaration must, so far as Great Britain is concerned, be regarded as at least doubtful. It has been fiercely assailed in England, but has been ably defended by eminent persons, among whom Westlake may be particularly mentioned, who, although they naturally do not pronounce it perfect, consider that its adoption would on the whole be advantageous. Into this general question it is beyond my province now to enter, my subject being simply contraband.

The Declaration (Article 24), following the Grotian classification, divides articles into (1) absolutely contraband, (2) conditionally contraband, and (3) absolutely noncontraband. The second category—the conditionally contraband—includes fourteen general

heads, namely, foodstuffs; forage and grain, suitable for feeding animals; clothing, fabrics for clothing, and boots and shoes, suitable for use in war; gold and silver in coin or bullion, and paper money; vehicles of all kinds available for use in war, and their component parts; vessels, craft, and boats of all kinds,<sup>27</sup> floating docks, parts of docks and their component parts; railway material, both fixed and rolling-stock, and materials for telegraphs, wireless telegraphs, and telephones; balloons and flying machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines; fuel, and lubricants; powder and explosives not specially prepared for use in war; barbed wire and implements for fixing and cutting it; horseshoes and shoeing materials; harness and saddlery; field glasses, telescopes, chronometers, and all kinds of nautical instruments. And to this list belligerents are (Article 25) allowed to add by declarations notified to other powers.

For all contraband the Declaration preserves (Article 39) the penalty of condemnation; and it provides (Article 33) that "conditional contraband" shall be liable to capture if "destined for the use of the armed forces or of a government department of the enemy state, unless in this latter case the circumstances show that the articles cannot in fact be used for the purposes of the war in progress." As to proof of destination, the provisions of the Declaration are two-fold. The doctrine of continuous voyage, though declared to be applicable to absolute contraband, is not applied to conditional, so that cargoes of the latter are not put in jeopardy when sent to a neutral port. This is a desirable and important safeguard. A hostile destination is, on the other hand, presumed (Article 34) "if the consignment is addressed to enemy authorities, or to a merchant, established in the enemy country, and when it is well

<sup>27</sup> This provision that vessels, craft and boats shown to be intended for belligerent use may be seized and confiscated as contraband evidently is not intended to alter or modify the law according to which the fitting out, arming, or equipping in neutral jurisdiction of a vessel to cruise or carry on war against one of the belligerents constitutes, not a mere transaction in contraband, but the setting on foot of a hostile expedition, which the neutral is bound to use due diligence to prevent.

known that this merchant supplies articles and material of this kind to the enemy," or "is destined to a fortified place of the enemy, or to another place serving as a base for the armed forces of the enemy." These grounds of inference are so vague and general that they would seem to justify in almost any case the presumption that the cargo, if bound to an enemy port, was "destined for the use of the armed forces or of a government department of the enemy state." Any merchant established in the enemy country, who deals in the things described, will sell them to the government; and if it becomes public that he does so, it will be "well known" that he supplies them. Again, practically every important port is a "fortified place"; and yet the existence of fortifications would usually bear no relation whatever to the eventual use of provisions and various other articles mentioned. Nor can it be denied that, in this age of railways, almost any place may serve as a "base" for supplying the armed forces of the enemy. And of what interest or advantage is it to a belligerent to prevent the enemy from obtaining supplies from a "base," from a "fortified place," or from a merchant "well known" to deal with him, in his own country, if he is permitted freely to obtain them from other places and persons, and especially, as countries having land boundaries can for the most part easily do, through a neutral port? No doubt the advantage of such prevention may readily become greater, if the enemy be, like Great Britain or Japan, an insular country. •

The attempt to establish an international prize court constitutes one of the most remarkable advances ever proposed towards the founding of an international jurisdiction, and the effort made in the Declaration of London to furnish a universal law is a step in the right direction. The able framers of the Declaration may be assumed to have made the best compromise that was at the time obtainable. But the question of contraband remains unsolved; and it will so remain either until, by an inconceivable relapse into primitive sixteenth-century conditions, all commerce with belligerents is forbidden, or until innocent articles of universal use, such as provisions, which, even when consumed by military men, are consumed by them as human beings rather than as soldiers, are, in conformity

with the traditional contention of the United States, put beyond reach of capture on loose and interested surmises.

While seizures of articles commonly classed as conditional contraband have inflicted upon neutrals enormous losses, the effect of such seizures upon the fortunes of the belligerents has by no means been so appreciable as it is often hastily assumed to have been. Lawless, unrestrained and successful as were the depredations on neutral commerce during the wars following the French Revolution, not only did the struggle persist through more than twenty years, but its end was scarcely hastened by the spoliations, which indeed seem rather to have supplied the means of its prolongation. The reduction of the South, during the American Civil War, was sensibly accelerated by the cutting off of its commerce, but this result was achieved chiefly by means of blockade.

At the Second Peace Conference at The Hague, in 1907, the British government, with a view to diminish the difficulties which neutral commerce encounters in case of war, proposed that the powers should enter into an agreement to abandon the principle of contraband altogether, and to confine the right of visit to the ascertainment of the merchant vessel's neutral character. Such a measure was justified on the ground that, while it had in spite of all efforts been found to be impossible to prevent belligerents from obtaining the munitions which they needed, the attempt to do so had, by reason of the increase in the tonnage of ships, the carrying of mixed cargoes, the lack of any single destination of ship or cargo, the multiplication of the number of articles used in war, and the development of railways and other means of transportation by land, become more and more futile on the part of belligerents and more and more injurious to neutrals. The circumstance that the radical proposal of Great Britain, although it was not eventually adopted by the Conference, received the support of twenty-six of the powers represented therein, while only five voted against it,<sup>28</sup> alone suffices

<sup>28</sup> For: Argentine Republic, Austria-Hungary, Belgium, Brazil, Bulgaria, Chile, China, Cuba, Denmark, Dominican Republic, Great Britain, Greece, Italy, Mexico, Netherlands, Norway, Paraguay, Peru, Persia, Portugal, Salvador, Servia, Siam, Spain, Sweden, Switzerland.—26.

Against: France, Germany, Montenegro, Russia, United States.—5.

to demonstrate the existence of a general conviction that the present state of things is altogether unsatisfactory.

Recalling the treaties between Prussia and the United States of 1785 and 1799 for the virtual abolition of contraband, it is curious to find the United States and Germany acting together as two of the five powers that voted against its abolition in 1907; but, although the United States voted against the British proposal, it is gratifying to note that Admiral Sperry, on behalf of the United States delegation, after the British proposal had failed to secure the unanimous approval of the conference, maintained the historic American position that the right of capture should be confined to articles agreed to be absolutely contraband. In this relation it may be observed that the Institute of International Law, in 1896, after much deliberation, voted that the category of conditional contraband should be abolished, the belligerent, however, to have the right, at his pleasure and subject to an equitable indemnity, to sequester or to preempt, when on their way to an enemy port, articles serving equally for war and for peace.<sup>29</sup> Rather than allow existing conditions to continue, it might be advisable to add to the present duties of neutrals the obligation to prohibit the exportation of arms and munitions of war to belligerents, it being agreed that commerce in all other articles should be free. Under the more efficient administrative methods now in vogue, the enforcement of a measure of this kind probably would not prove to be so difficult as it was once supposed to be. Several examples of such a prohibition have already been given.<sup>30</sup> By a joint resolution of the Congress of the United States of April 22, 1898, passed at the opening of the war with Spain, the President was "authorized, in his discretion and with such limitations and exceptions as shall seem to him expedient, to prohibit the export of coal or other material used in war from any seaport of the United States until otherwise ordered" by himself or by Congress. Not only was this law en-

Abstaining: Japan, Panama, Rumania, Turkey.—4.

See Deuxième Conférence de la Paix, Actes et Documents, I., 259; III., 881, 890.

<sup>29</sup> *Annuaire de l'Institut de Droit International*, Vol. 15 (1896), 231. See Westlake's comments, *Int. Law*, II., 249.

<sup>30</sup> *Supra*, pp. 22-23.



forced during the war with Spain,<sup>30</sup> but the President, by a proclamation of October 14, 1905, prohibited, without limitation or exception, till it should be otherwise ordered, the export of arms and munitions of war to the Dominican Republic. This prohibition, as the proclamation recites, was established for what appeared to the President to be "good and sufficient reasons." It was not founded upon any legal obligation. The fact that the American supervision of the Dominican customs administration had then in effect begun furnished a special justification for preventing acts that tended to disturb the public peace of the island. Nevertheless, the interest of the United States in the collection of the Dominican customs can hardly be considered as more important than its interest in the adjustment and preservation of the rights of neutral commerce in time of war, or as rendering proper in the former case a precaution which would not be admissible in the latter. It is not, however, my purpose to lay undue stress upon the method of dealing with absolute contraband; nor do I wish to intimate that the general abolition of conditional contraband should await the adoption of further measures in respect of absolute contraband.

#### APPENDIX.

##### NOTE A.

*Treaty of Commerce between the United States and Italy*, February 26, 1871, Articles XII. and XV.

Art. XII. The high contracting parties agree that, in the unfortunate event of a war between them, the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure, on the high seas or elsewhere, by the armed vessels or by the military forces of either party; it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party.

Art. XV. The liberty of navigation and commerce secured to neutrals by the stipulations of this treaty shall extend to all kinds of merchandise, excepting those only which are distinguished by the name of contraband of war. And, in order to remove all causes of doubt and misunderstanding upon this subject, the contracting parties expressly agree and declare that the following articles, and no others, shall be considered as comprehended under this denomination:

<sup>30</sup> Moore, "Digest of International Law," VII., 194.

1. Cannons, mortars, howitzers, swivels, blunderbusses, muskets, fuses, rifles, carbines, pistols, pikes, swords, sabers, lances, spears, halberds, bombs, grenades, powder, matches, balls, and all other things belonging to, and expressly manufactured for, the use of these arms.

2. Infantry belts, implements of war and defensive weapons, clothes cut or made up in a military form and for a military use.

3. Cavalry belts, war saddles and holsters.

4. And generally all kinds of arms and instruments of iron, steel, brass, and copper, or of any other materials manufactured, prepared, and formed expressly to make war by sea or land.

#### NOTE B.

*Proposition (translated) of the Delegation of the United States at The Hague Conference of 1907 on Contraband of War:*

1. Absolute contraband shall consist of arms, munitions of war, provisions, and articles employed solely for a military purpose or for military establishments.

2. Conditional contraband shall consist of provisions, materials and articles which are employed for the double purpose of peace and of war, but which by reason of their nature or special qualities, or their quantity, or by their nature, quality and quantity are suitable and necessary for a military purpose, and which are destined for the use of the armed forces or the military establishments of the enemy.

3. The list of articles and of provisions which shall be included in each of the aforesaid classes must be duly published and notified to neutral governments, or to their diplomatic agents, by the belligerents, and no article shall be seized or confiscated under the head of conditional contraband as to which such advice has not been given. ("Deuxième Conférence de la Paix," Actes et Documents, III, 1160.)

#### NOTE C.

*Treaty of the Pyrenees, November 7, 1759.*

XII. By . . . Contraband-Goods, are only understood all sorts of Fire-Arms, and all things belonging to them; as Cannons, Muskets, Mortar-pieces, Petards, Bombs, Granadoes, Saucidges, Pitch'd-circles, Carriages, Forks, Bandaliers, Gunpowder, Cords, Saltpeter, Bullets, Pikes, Swords, Casks, Head-pieces, Cuirasses, Halberts, Javelins, Horses, Saddles for Horses, Holsters for Pistols, Belts, or any other warlike Furnitures.

XIII. In that kind of Contraband-Goods, shall not be comprehended Wheat, Corn, or other Grains, Pulse, Oils, Wines, Salt, nor generally anything belonging to the nourishment and sustentation of Life; but they shall remain free, as all other Merchandizes and Commodities, not comprehended in the foregoing Article: And the transportation of them shall be free, even to Places in enmity with the Crown of Spain, except Portugal, as aforesaid, and the Towns and Places besieged, block'd up, or surrounded. (Treaty of the

Pyrenees, concluded between France and Spain, November 7, 1659: Vol. I, pp. 45-46, of "A General Collection of Treatys, Declarations of War, Manifestos, and other Publick Papers, relating to Peace and War," 2d edition, London, 1732.)

NOTE D.

*Treaty of Commerce between Great Britain and France*, Signed at Utrecht, March 31-April 11, 1713, Arts. XIX., XX.

Article XIX. Under this name of contraband, or prohibited goods, shall be comprehended arms, great guns, bombs, with their fuses and other things belonging to them; fire-balls, gunpowder, match, cannon-ball, pikes, swords, lances, spears, halberds, mortars, petards, granadoes, saltpetre, muskets, musket-ball, helmets, head-pieces, breast-plates, coats of mail, and the like kinds of arms, proper for arming soldiers, musket-rests, belts, horses with their furniture, and all other warlike instruments whatever.

Article XX. These merchandizes which follow shall not be reckoned among prohibited goods, that is to say, all sorts of clothes, and all other manufactures woven of any wool, flax, silk, cotton, or any other materials whatever; all kinds of clothes and wearing apparel, together with the species whereof they are used to be made; gold and silver, as well coined as uncoined, tin, iron, lead, copper, brass, coals; as also wheat and barley, and any other kind of corn, and pulse; tobacco, and likewise all manner of spices, salted and smoked flesh, salted fish, cheese and butter, beer, oils, wines, sugars, and all sorts of salt, and, in general, all provisions which serve for the nourishment of mankind, and the sustenance of life. Furthermore, all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sailcloths, anchors, and any parts of anchors; also shipmasts, planks, boards and beams of what trees soever; and all other things proper either for building or repairing ships; and all other goods whatever, which have not been worked into the form of any instrument, or thing prepared for war, by land or by sea, shall not be reputed contraband, much less such as have been already wrought and made up for any other use; all which shall wholly be reckoned among free goods, as likewise all other merchandizes and things which are not comprehended, and particularly mentioned in the preceding article, so that they may be transported, and carried in the freest manner by the subjects of both confederates, even to places belonging to an enemy, such towns or places being only excepted, as are at that time besieged, blocked up round about, or invested. (Jenkinson's "Treaties," II., 51.)

NOTE E.

*Treaty of Commerce and Navigation between Great Britain and Russia*, June 20, 1766, Arts. X. and XI., referred to in the third article of the declaration of the Empress Catherine of Feb. 28, 1780.

X. Permission shall be granted to the subjects of the two contracting parties to go, come, and trade freely with those states, with which one or other of the parties shall at that time, or at any future period, be engaged in

war, provided they do not carry military stores to the enemy. From this permission, however, are excepted places actually blocked up, or besieged, as well by sea as by land; but at all other times, and with the single exception of military stores, the above-said subjects may transport to these places all sorts of commodities, as well as passengers without the least impediment. With regard to the searching of merchant ships, men of war and privateers shall behave as favourably as the reason of the war, at that time existing, can possibly permit towards the most friendly powers that shall remain neuter; observing, as far as may be, the principles and maxims of the law of nations, that are generally acknowledged.

XI. All cannon, mortars, muskets, pistols, bombs, grenades, bullets, balls, fusees, flint-stones, matches, powder, saltpetre, sulphur, breast-plates, pikes, swords, belts, cartouch-bags, saddles, and bridles, beyond the quantity that may be necessary for the use of the ship, or beyond what every man serving on board the ship, and every passenger, ought to have, shall be accounted ammunition or military stores; and, if found, shall be confiscated, according to law, as contraband goods or prohibited commodities; but neither the ships nor passengers, nor the other commodities found at the same time, shall be detained or hindered to prosecute their voyage. (Chalmers, I., 7.)

#### NOTE F.

*Treaty between the United States and Great Britain, November 19, 1794,  
Art. XVIII.*

Article XVIII. In order to regulate what is in future to be esteemed contraband of war, it is agreed that under the said denomination shall be comprised all arms and implements serving for the purposes of war, by land or sea, such as cannon, muskets, mortars, petards, bombs, grenades, carcasses, saucisses, carriages for cannon, musket-rests, bandoliers, gun-powder, match, saltpetre, ball, pikes, swords, head-pieces, cuirasses, halberts, lances, javelins, horse-furniture, holsters, belts, and generally all other implements of war, as also timber for ship-building, tar or rosin, copper in sheets, sails, hemp, and cordage, and generally whatever may serve directly to the equipment of vessels, unwrought iron and fir planks only excepted; and all the above articles are hereby declared to be just objects of confiscation whenever they are attempted to be carried to an enemy.

And whereas the difficulty of agreeing on the precise cases in which alone provisions and other articles not generally contraband may be regarded as such, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise: It is further agreed that whenever any such articles so becoming contraband, according to the existing laws of nations, shall for that reason be seized, the same shall not be confiscated, but the owners thereof shall be speedily and completely indemnified; and the captors, or, in their default, the Government under whose authority they act, shall pay to the masters or owners of such vessels the full value of all such articles, with a reasonable mercantile profit thereon, together with the freight, and also the demurrage incident to such detention.

And whereas it frequently happens that vessels sail for a port or place belonging to an enemy without knowing that the same is either besieged, blockaded or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place; but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless after notice she shall again attempt to enter, but she shall be permitted to go to any other port or place she may think proper; nor shall any vessel or goods of either party that may have entered into such port or place before the same was besieged, blockaded, or invested by the other, and be found therein after the reduction or surrender of such place, be liable to confiscation, but shall be restored to the owners or proprietors thereof.

NOTE G.

*Treaty of Commerce between the United States and France, February 6, 1778, Arts. XXIII., XXIV.*

Art. XXIII. It shall be lawful for all and singular the subjects of the Most Christian King, and the citizens, people and inhabitants of the said United States, to sail with their ships with all manner of liberty and security, no distinction being made who are the proprietors of the merchandizes laden thereon, from any port to the places of those who now are or hereafter shall be at enmity with the Most Christian King or the United States. It shall likewise be lawful for the subjects and inhabitants aforesaid to sail with the ships and merchandizes aforementioned, and to trade with the same liberty and security from the places, ports and havens of those who are enemies of both or either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy aforementioned to neutral places, but also from one place belonging to an enemy to another place belonging to an enemy, whether they be under the jurisdiction of the same Prince or under several. And it is hereby stipulated that free ships shall also give a freedom to goods, and that everything shall be deemed to be free and exempt which shall be found on board the ships belonging to the subjects of either of the confederates, although the whole lading or any part thereof should appertain to the enemies of either, contraband goods being always excepted. It is also agreed in like manner that the same liberty be extended to persons who are on board a free ship, with this effect, that although they be enemies to both or either party, they are not to be taken out of that free ship, unless they are soldiers and in actual service of the enemies.

Art. XXIV. This liberty of navigation and commerce shall extend to all kinds of merchandizes, excepting those only which are distinguished by the name of contraband; and under this name of contraband or prohibited goods shall be comprehended arms, great guns, bombs with the fuzes, and other things belonging to them, cannon-ball, gunpowder, match, pikes, swords, lances, spears, halberds, mortars, petards, grenades, saltpetre, muskets, musket-ball, bucklers, helmets, breast-plates, coats of mail, and the like kinds of arms proper for arming soldiers, musket-rests, belts, horses with their furniture, and all other warlike instruments whatever. These merchandizes which fol-



low shall not be reckoned among contraband or prohibited goods; that is to say, all sorts of cloths, and all other manufactures woven of any wool, flax, silk, cotton or any other materials whatever; all kinds of wearing apparel, together with the species whereof they are used to be made; gold and silver, as well coined as uncoined, tin, iron, latten, copper, brass, coals; as also wheat and barley, and any other kind of corn and pulse; tobacco, and likewise all manner of spices; salted and smoked flesh, salted fish, cheese and butter, beer, oils, wines, sugars, and all sorts of salts; and in general all provisions which serve for the nourishment of mankind and the sustenance of life; furthermore, all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sail-cloths, anchors and any parts of anchors, also ships' masts, planks, boards and beams of what trees soever; and all other things proper either for building or repairing ships, and all other goods whatever which have not been worked into the form of any instrument or thing prepared for war by land or by sea, shall not be reputed contraband, much less such as have been already wrought and made up for any other use; all which shall be wholly reckoned among free goods; as likewise all other merchandizes and things which are not comprehended and particularly mentioned in the foregoing enumeration of contraband goods; so that they may be transported and carried in the freest manner by the subjects of both confederates, even to places belonging to an enemy, such towns or places being only excepted as are at that time besieged, blocked up, or invested.

#### NOTE H.

*Treaty between the United States and Prussia, September 10, 1785 (signed on the part of the United States by Franklin, Jefferson, and Adams),*  
Art. XIII.

Article XIII. And in the same case of one of the contracting parties being engaged in war with any other Power, to prevent all the difficulties and misunderstandings that usually arise respecting the merchandize heretofore called contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of one of the parties to the enemies of the other, shall be deemed contraband, so as to induce confiscation or condemnation and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding, paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors: And it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed, of a vessel stopped for articles heretofore deemed contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not in that case be carried into any port, nor further detained, but shall be allowed to proceed on her voyage.

*Treaty between the United States and Prussia, July 11, 1799 (signed on the part of the United States by John Quincy Adams), Art. XIII.*

Article XIII. And in the same case of one of the contracting parties being engaged in war with any other Power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband, so as to induce confiscation or condemnation and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding, paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not in that case be carried into any port, nor further detained, but shall be allowed to proceed on her voyage.

All cannons, mortars, fire-arms, pistols, bombs, grenades, bullets, balls, muskets, flints, matches, powder, saltpetre, sulphur, cuirasses, pikes, swords, belts, cartouch boxes, saddles and bridles, beyond the quantity necessary for the use of the ship, or beyond that which every man serving on board the vessel, or passenger, ought to have; and in general whatever is comprised under the denomination of arms and military stores, of what description soever, shall be deemed objects of contraband.

#### NOTE I.

*Treaty between the United States and Colombia, October 3, 1824, Arts. XIV., XV.*

Art. XIV. This liberty of navigation and commerce shall extend to all kinds of merchandises, excepting those only which are distinguished by the name of contraband; and under this name of contraband or prohibited goods shall be comprehended—

First. Cannons, mortars, howitzers, swivels, blunderbusses, muskets, fusees, rifles, carbines; pistols, pikes, swords, sabres, lances, spears, halberds and grenades, bombs, powder, matches, balls and all other things belonging to the use of these arms;

Secondly. Bucklers, helmets, breast-plates, coats of mail, infantry belts, and clothes made up in the form and for a military use;

Thirdly. Cavalry belts and horses with their furniture;

Fourthly. And generally all kinds of arms and instruments of iron, steel, brass and copper, or of any other materials manufactured, prepared and formed expressly to make war by sea or land.

Art. XV. All other merchandises and things not comprehended in the articles of contraband explicitly enumerated and classified as above, shall be held and considered as free, and subjects of free and lawful commerce, so that they may be carried and transported in the freest manner by both the contracting parties, even to places belonging to an enemy, excepting only those places which are at that time besieged or blocked up; and, to avoid all doubt in this particular, it is declared that those places only are besieged or blockaded which are actually attacked by a belligerent force capable of preventing the entry of the neutral.